Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1971

No. 71-717

JOSEPH KROZAK,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for the Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

(4728) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-

JOSEPH KROZAK,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Krozak, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, convicting the petitioner of one count of perjury (16 U.S.C. §1621), after trial before Motley, D.J. and a jury.

The petitioner was sentenced to the maximum term of five years imprisonment although he was a first offender and had been acquitted of another count of perjury by the same jury.

Opinion Below

There was no opinion rendered by the United States Court of Appeals when it affirmed the judgment of conviction.

Jurisdiction

The United States Court of Appeals affirmed the judgment convicting petitioner of the crime of perjury on the 3rd day of November, 1971. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

1. Whether the issue of "materiality" in a case of perjury must ultimately be submitted to the triers of fact for their determination?

In the case at bar the Trial Judge ruled, as a matter of law, that the questions posed to Krozak, upon which his indictment was based, were "material" and never presented the issue to the jury.

2. Whether the "two witness rule" in perjury cases is satisfied by the uncorroborated testimony of two witnesses, each testifying as to a different allegation of perjury, leaving only a single witness' testimony with respect to any single allegation of perjury?

3. Whether this Court, under its supervisory powers, should vacate the sentence of five years imposed herein on the grounds that the Trial Judge abdicated her judicial responsibility by proclaiming that everyone convicted of perjury before her receives five years imprisonment?

4. The foregoing question raises the issue of whether cruel and unusual punishment was meted out in violation of the Eighth Amendment.

Constitutional and Statutory Provisions Involved

Pertinent portions of the Fifth and Eighth Amendments are involved as is 18 U.S.C. §1621.

Statement of the Case

The petitioner herein was charged with two counts of perjury. In the first count, it was alleged that he gave certain sums of money in "cash" to governmental employees on the municipal and county level from a company known as Professional Health Services in which Krozak was an officer.

There was testimony by several persons employed by the Department of Social Services who stated that one Sylvia Diaz, who also worked for that department, had given them cash on different occasions which allegedly came from the petitioner.

Two individuals testified that on separate occasions, not jointly, Krozak had given each of them cash.

This statement of facts crystallizes the issue.

It is submitted that no two witnesses ever testified that they received money on the same occasion from Krozak. No more than one witness ever stated that Krozak gave him or her money on any particular individual occasion. In other words, Krozak, if he gave money at all, always gave it to the individual alone without any other witness present.

In the Grand Jury, the petitioner did not deny that he had given certain money to some people, but did deny that he had given "cash" from Professional Health Services. The question of the prosecutor in the Grand Jury limiting the issue to whether or not "cash" was given from "Professional Health Services" was in essence a "negative pregnant" since money may have been given from Professional Billing Services or Rugby Funding Company, both of which companies Krozak had an interest in.

It must be borne in mind that Krozak was born the son of an Arkansas sharecropper and was largely self-educated. A black man, he had overcome many obstacles, but was unable to cope with the skillful questioning of the United States Attorney in the Grand Jury.

Argument

Point I.

THE CONVICTION OF THE PETITIONER WAS PREDICATED UPON THE TESTIMONY OF SINGLE WITNESSES AS TO SEPARATE ALLEGED INCIDENTS. THE COURT NEVER DEFINED WHAT IT MEANT BY "CORROBORATION" WHICH COULD BE USED INSTEAD OF TWO WITNESSES TO SATISFY 18 U.S.C. §1621.

The statute herein, 18 U.S.C. §1621, specifically requires that a jury must find that at least two witnesses are able to corroborate the perjury attributed to the accused or that at least one witness plus corroboration must attest to it.

In the case at bar there were several witnesses who referred to having received cash from Krozak on different occasions, no two of them ever receiving it at one time. Only two witnesses actually stated they had received cash from Krozak himself but, here again, the instances were separated by intervals of time and location. Thus, the Government failed to establish by the testimony of two witnesses or one witness plus corroboration, that on any single occasion he had given cash to anyone. It was really Krozak's word against that of the recipient.

Perjury itself must be proved directly. Only the element of wilfullness may be proved circumstantially. We maintain that there was no direct proof by two witnesses or even one witness with substantial corroboration as to any event which indicated a lie on the part of the petitioner.

Perhaps the leading case on the "Two-witness rule" is Weiler v. United States, 323 U.S. 606 (1945). At pages 608-9 of 323 U.S. the Supreme Court explained:

> "The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecutions more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an 'anachronistic' rule which tends to burden and discourage prosecutions for perjury. Pro-

> ponents of the rule, on the other hand, contend that society is well served by such consequence. Lawsuits frequently engender in defeated litigants, sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.... Since equally honest witnesses may well have differing recollections of same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon an 'oath against an oath.' The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted." See generally, Orfield, Proof of Perjury and the "Two Witnesses" Requirement in Federal Criminal Cases, 17 S.W.L.J. 227 (1963).

See also, People v. Gleason, 285 App. Div. 278, where the Appellate Division declared that the "two-witness rule" was designed "to make convictions for perjury more difficult to obtain than in the case of other crimes."

See also, United States v. Nicholson, 327 F.2d 491 (2 Cir. 1964); United States v. Bufalino, 285 F.2d 408, 418 (2 Cir. 1960); United States v. Remington, 191 F.2d 246, 249 (2 Cir. 1951), cert. denied, 343 U.S. 907 (1952).

We maintain further that there was no independent corroboration or admissions by the petitioner which would satisfy the two witness rule as to the payment of cash within the narrow confines as alleged in Count 1 of the indictment, which is the only count upon which the petitioner was convicted (cf: United States v. Goldberg, 209 F.2d 729, 734 (2 Cir.), cert. denied, 368 U.S. 899 (1961).

In this context it should be noted that the question posed in Count 1 of the indictment "Did you pay any money in cash from Professional Health Services...[to an] official of the state or city government?" is the crucial issue.

While there is additional colloquy with the witness, it must be borne in mind that "cash" and Professional Health Services were the prime subjects of the inquiry at that juncture. The questioner did not allude to Rugby Funding Company nor did the questioner allude to Professional Billing Services.

Since this is a criminal case the Government has an obligation to prove the precise charges that are alleged in the indictment and not something else. (Russel v. United States, 369 U.S. 749 (1962).

It is therefore patent that the Government failed in its obligation to provide two witnesses or one witness plus corroboration to any single act which was the subject of the indictment. The Government argued that because it had established that on separate occasions Krozak had given money to at least two people, those separate occasions were

corroborative of each other. They were, however, two completely distinct and different situations involving two different people, neither of whom was affiliated with the other.

It is maintained herein that this was insufficient to support a conviction for perjury which the law has deliberately made a technical charge and which must be interpreted strictissimi juris.

Point II.

THE TRIAL COURT ERRONEOUSLY RULED THAT THE QUESTION OF "MATERIALITY" WHICH IS A REQUISITE OF THE STATUTE, WAS AN ISSUE OF LAW AND NEED NEVER BE DECIDED BY THE JURY. THE JURY ACCORDINGLY, WAS NOT PERMITTED TO CONSIDER WHETHER THE MATTERS INVOLVED WERE "MATERIAL" TO THE INVESTIGATION.

In United States v. Marchisio, 344 F.2d 653 (2 Cir. 1965), the Court aptly observed that it is fundamental to a prosecution for perjury that the statements alleged to be perjurious "must be material in order to sustain a perjury-conviction." A similar observation is made in the more recent pronouncement of the United States Court of Appeals for the Second Circuit in United States v. Stone, 429 F.2d 138 (2 Cir. 1970) but the Court added the following (id. at 140):

> "The Government must prove the materiality of the false testimony."

There have been further declarations by the Circuit Court that materiality is an issue of law

(United States v. Alu, 246 F.2d 29 (2 Cir. 1957)). In considering this last statement however, it is submitted that further explanation of the proof of materiality makes it evident that the issue of materiality is a question of law in the first instance. Thus, in Barnes v. United States, 378 F.2d 646 (5 Cir. 1967), the Court explained the rule as follows:

> "The materiality of the testimony in issue is a question for the court in the first instance. Such evidence should not go to the jury if the court considers it immaterial. Hoover v. United States, 358 F.2d 87 (5 Cir. 1966); Harrel v. United States, 220 F.2d 516 (5 Cir. 1955); Dolan v. United States, 218 F.2d 454 (8 Cir. 1955). The test of materiality is 'whether the false testimony was capable of influencing the tribunal on the issue before it.' Blackmon v. United States, 108 F.2d 572, 573 (5 Cir. 1940). See United States v. Lattimore, 94 U.S. App. D.C. 268, 215 F.2d 847 (1954). In addition, 'it is not necessary that the evidence given is material to the main issue; it is sufficient if it is material to any proper matter of inquiry.' Blackmon v. United States, supra at page 574 of 108 F.2d 3 Charton, Criminal Law & Procedure, §1309, 10, 11 (12th Ed. 1957); Annot., 62 A.L.R. 2d 1027, 1031, (1958); Underhill's Criminal Evidence, §736 (Niblack, 4th Ed. 1935)."

In the Barnes case, supra, the District Court had ruled on the question of materiality since without such a ruling the issue would never go to the

jury at all. The question of materiality however, was ultimately submitted to the jury. This is not unlike the situation in Jackson v. Denno, 378 U.S. 368 (1964), where both the Court and jury ultimately make decisions as to admissibility of confessions. (cf: People v. Huntley, 15 N.Y.2d 72).

Since one of the essential elements of perjury is that the matters be "material", it is manifest that the jury must ultimately decide this all important question although, concedely, the Court must preliminarily rule since, if the evidence is clearly immaterial, the case would never be submitted to a jury.

We also ask the Court to note that the indictment herein is for perjury and not for a violation of 18 U.S.C. §1001. In the latter situation materiality is not an essential ingredient (United States v. Marchisio, supra, 344 F.2d at 666). Perhaps the Court below was confused with Section 1001 because it refused to submit the question of materiality to the jury (United States v. Silver, 235 F.2d 375, 377 (2 Cir.), cert. denied, 252 U.S. 880).

The Court did not explain to the talismen what constituted the required corroboration to satisfy the two-witness rule. The jury was left to speculate as to what constituted necessary corroboration.

Point III.

THE DISTRICT COURT ABDICATED ITS JUDICIAL RESPONSIBILITY BY IMPOSING A FIVE YEAR MAXIMUM SENTENCE UPON KROZAK EXPLAINING THAT IT ALWAYS IMPOSES FIVE YEARS FOR THE CRIME OF PERJURY IRRESPECTIVE OF THE PROBATION REPORTS OR OF THE ACCUSED'S BACKGROUND. KROZAK WAS A FIRST OFFENDER.

The Trial Court in this case in effect abdicated its judicial responsibility and discretion by announcing that in perjury cases it always imposed a five year sentence.

We maintain that this may rise to an actual violation of the Eighth Amendment of the United States Constitution since it would carry the stigma of cruel and unusual punishment.

While a sentencing court certainly has the right to impose a sentence within the statutory bounds, an announcement that the Court always imposes five years irrespective of the background of the individual is hardly consistent with proper judicial functions.

The Trial Judge imposed virtually the maximum sentence permitted by law, five (5) years, upon Krozak, who is a first offender and had a good background.

His probation report must have been far better than many that pass through the sentencing procedures of federal courts. Yet, he was given one of the harshest sentences permitted by law.

The Court, however, apparently abdicated her judicial function in the imposition of sentence since she frankly declared that everyone who is convicted of perjury before her receives five years.

Such a sentencing procedure violates due process and this Court in its supervisory role should not condone such abdication of judicial function. (United States v. Malcolm, ____ F.2d ____ 2 Cir. 1971, decided 6/71; Verdugo v. United States, 402 F.2d 566, 9 Cir. 1968; Note, "Procedural Due Process at Judicial Sentencing for Felony", 1968, 81 Harv. L.Rev. 821).

How does such an unconscionably long sentence find any justification in view of lesser punishments meted out in such cases as United States v. Sweig, 441 F.2d 114 (2 Cir. 1971); United States v. Stone, 429 F.2d 138 (2 Cir. 1970); United States v. Fiorillo, 376 F.2d 180 (2 Cir. 1967) etc.?

Punishment of this sort is tantamount to cruel and unusual punishment in violation of the Eighth Amendment and ought not be condoned. "Let the punishment fit the crime" does not mean indiscriminate imposition of maximum sentences irrespective of the merits of the offense and the probation report (Rule 32 F.R.Cr. P. is really a mockery in this instance).

Circuit Courts have an obligation to supervise lower federal courts and to guide district judges if guidance is indicated. (United States v. Sanchez, 361 F.2d 824, 2 Cir. 1966; Godfrey v. United States, 358 F.2d 850, D.C. Cir. 1966; Malcolm v. United States, supra. (United States v. Wiley, 267 F.2d 453 [7 Cir. 1959]).

How can there be respect or even any sense of fairness when one judge imposes such a disproportionately higher sentence for an offense when coordinate solons have meted out punishments to more severe offenders of a substantially lesser amount.

Only this Court can rectify such a disparity of treatment and ought to set procedures and guidelines.

This Court should declare the sentence herein an abuse of discretion and in view of the statement of the Court below that it uniformly imposes such punishment for perjury, that due process of law and Rule 32 F.R.Cr.P. demands that judicial discretion in sentencing be exercised on an individual case by case basis and not be uniformly indiscriminate, as herein.

> "When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." Coppedge v. United States, 369 U.S. 438, 449.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Order

UNITED STATES COURT OF APPEALS

Second Circuit

71-1478

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of September, one thousand nine hundred and seventy-one.

United States of America,

Plaintiff-Appellee,

v.

Joseph Krozak,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant Krozak by notice of motion dated September 16, 1971 for bail pending appeal be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

Appendix

* * * *

BEFORE: HON. J. EDWARD LUMBARD,

HON. WALTER R. MANSFIELD,

HON. JAMES L. OAKES,
Circuit Judges

Order of Affirmance

UNITED STATES COURT OF APPEALS

For the

SECOND CIRCUIT

71-1478

At the Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of November one thousand nine hundred and seventy-one.

Present:

HON. STERRY R. WATERMAN,

HON. J. JOSEPH SMITH,

HON. WILLIAM H. TIMBERS,

Circuit Judges.

Appendix

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United States of America,

Plaintiff-Appellee,

v.

Joseph Krozak,

Defendant-Appellant.

---x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United Stated District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1971

SUPREME COURT, U. S.

JOSEPH KROZAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-717

JOSEPH KROZAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having committed perjury before a grand jury, in violation of 16 U.S.C. 1621. He was sentenced to five years' imprisonment. The court of appeals affirmed without opinion (Pet. 3a).

The indictment alleged that petitioner had lied to the grand jury when he testified that he had not given any money, and had no knowledge of any funds having been given, to city and state employees on behalf of his company, Professional Health Services, Inc. Professional Health Services, through its subsidiary, Rugby Fund-

ing, purchased at discount accounts receivable which were payable by New York counties and municipalities to providers of medical services under Medicaid (Tr. 168, 172, 367-368).[1]

At trial three New York city employees and one county employee testified to having received (prior to petitioner's grand jury testimony) cash either from petitioner directly or from one Sylvia Diaz, on behalf of Rugby Funding. According to their testimony, the money was paid in order to expedite payment of checks to Rugby Funding (Tr. 196, 232, 234, 258-259, 288, 322). When he took the stand at his trial, petitioner admitted having made payments, through Sylvia Diaz, to three of these employees (Tr. 416-417, 455-456). His defense was that he thought the grand jury was interested in "bigger fish" (Tr. 422).

1. Petitioner contends that the proof did not satisfy the "two-witness" rule[2] which the court properly explained in its charge (Tr. 571-573). The evidence of perjury was, however, overwhelming and clearly met the requirements of the rule. Sylvia Diaz' testimony that she had received cash from petitioner to distribute to city employees was corroborated by these employees and admitted by petitioner (Tr. 107, 109-110, 112-113, 165-166, 196, 232, 234, 258-259, 288, 417, 455-456). Corroborating evidence does not have to be identical in every respect. Furthermore, petitioner admitted giving money directly to at least one city employee (Tr. 457).

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[1] Tr. references are to the transcript of the trial in the district court, a copy of which we are lodging with the Clerk.

[2] *See Weiler v. United States*, 323 U.S. 606.

2. Petitioner also contends that the question of materiality should have been submitted to the jury. It is well settled, however, that the issue of materiality in a perjury prosecution is for the court. *E.g., Sinclair* v. *United States*, 279 U.S. 263, 298; *United States* v. *Stone*, 429 F. 2d 138 (C.A. 2); *Vitello* v. *United States*, 425 F. 2d 416 (C.A. 9), certiorari denied, 400 U.S. 822.[3]

3. Petitioner contends that his five-year sentence was improper since the district judge stated at one point that she has always imposed the maximum in perjury cases (Tr. 629-630). However, the underlying facts as to petitioner's repeated bribery of city and county officials clearly warranted the sentence imposed. We note that the trial judge indicated a willingness to consider a motion to reduce sentence, contingent on petitioner's cooperation in the government investigation (Tr. 620), thus suggesting that, given extenuating circumstances, the trial judge might impose a shorter sentence for perjury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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[3] Petitioner's reliance on *Barnes* v. *United States*, 378 F. 2d 646 (C.A. 5), is misplaced, since the court there specifically held that the trial judge had erred in submitting the issue of materiality to the jury. *Id.* at 650.

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